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No. 91-1231

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

ALVIN J. DIXON

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FOSTER

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents state that we have "urge[d] the Court to jettison normal double jeopardy principles" in cases involving successive prosecutions for criminal contempt and substantive criminal offenses, Resp. Br. 13; that we have attempted to "establish an exception to double jeopardy law," Resp. Br. 24; and that we

have argued that defendants in criminal contempt cases should be "refus[ed] * * * the protection of the Double Jeopardy Clause," Resp. Br. 25.

Respondents do not accompany any of those assertions with citations to our petition or brief, and their characterizations misconstrue our position. We have not argued that this Court should "jettison" normal double jeopardy principles or that the Double Jeopardy Clause is in some way inapplicable to criminal contempt offenses. On the contrary, we accept the proposition that the Double Jeopardy Clause is applicable to prosecutions for criminal contempt, as it is to any other criminal prosecution. But that is merely the starting point for the real inquiry in this case. As we pointed out in our reply brief at the petition stage, "[t]he question presented in this case is not whether the Double Jeopardy Clause applies to criminal contempt cases, * * * [but] whether criminal contempt is the 'same offense' as the substantive criminal offenses charged." Pet. Rep. Br. 9. We have consistently argued to this Court that criminal contempt is not the same offense as a substantive criminal offense based on the same conduct. See, *e.g.*, Pet. Br. 10, 14, 17, 24, 29, 31, 42, 45. Respondents' lengthy argument (Resp. Br. 10-18) that the Double Jeopardy Clause applies to prosecutions for criminal contempt is thus beside the point.

As a result of respondents' mistaken view of the question presented, their reliance on the summary decisions in *Menna* v. *New York*, 423 U.S. 61 (1975), and *Colombo* v. *New York*, 405 U.S. 9 (1972), is misplaced. See Resp. Br. 19-21. In each of those cases, the defendant was prosecuted in state court for criminal contempt for refusing to testify before a grand jury and then indicted under another criminal

contempt provision of the state criminal code. In both cases, this Court remanded to the state court for further proceedings on the defendants' double jeopardy claims. We agree that a premise of those decisions is that the Double Jeopardy Clause applies to prosecutions for criminal contempt. But neither decision can fairly be read to hold that contempt of court is the "same offense" as a substantive criminal offense whenever the contempt consists of violating a court order and the criminal offense involves the same conduct.

Neither in *Menna* nor in *Colombo* did this Court decide whether the Double Jeopardy Clause barred the prosecutions at issue there. The Court in *Colombo* stated that it was "disinclined at this juncture to entertain and determine the double jeopardy question presented by petitioner," 405 U.S. at 11, while the Court in *Menna* "express[ed] no view" on the merits of the double jeopardy claim, 423 U.S. at 63. Contrary to respondents' contention, *Menna* and *Colombo* did not decide by implication the double jeopardy questions that the Court expressly declined to address.

Even if the Court had decided the merits of the double jeopardy questions presented in *Menna* and *Colombo*, those questions differed substantially from the question presented here. *Menna* and *Colombo* involved successive prosecutions for criminal contempt of court and for another offense that was similar, if not identical, to criminal contempt of court. See *Colombo*, 405 U.S. at 10. Since the Double Jeopardy Clause applies to the offense of criminal contempt, a defendant cannot be prosecuted twice for that offense. In this case, however, respondents were not prosecuted twice for criminal contempt of court. Rather, they were prosecuted for criminal contempt of court

and then for substantive criminal offenses having nothing to do with contempt. Accordingly, even if this Court had determined that the defendants in *Menna* and *Colombo* had been successively prosecuted for criminal contempt, that determination would have had little bearing on the question whether respondents in this case were prosecuted twice for the "same offense." [1]

2. As we explained in our opening brief (at 10-14), the overwhelming weight of authority establishes that a defendant may be successively prosecuted for contempt and for a substantive offense based on the same conduct. This Court's earliest statements to that effect were in *In re Debs*, 158 U.S. 564 (1895), and the Court expressed similar views in *In re Chapman*, 166 U.S. 661 (1897); *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 330 (1904), and *Jurney* v. *MacCracken*, 294 U.S. 125, 151 (1935). The lower federal and state courts have reached the same conclusion, relying on a variety of grounds. See Pet. Br. 12-23.

Respondents attempt to explain away this Court's statements in *Debs* as "dicta." Resp. Br. 19. The statements in *Debs*, however, were not mere casual observations; rather, they reflected the well-recognized legal principle that contempt and a substantive offense based on the same conduct are not the same offense and may be separately prosecuted. The principle stated by the Court in *Debs* was settled at that time and has been recognized in numerous cases since then, as respondents acknowledge. See Resp. Br. 24 (noting that many cases have cited the "established rule" that allows successive prosecutions for criminal contempt and substantive offenses).[2]

Nor can respondents convincingly distinguish *Chapman* and *Jurney* on the ground that those cases concerned contempt of Congress rather than contempt of court. Resp. Br. 19 n.6. Congress's power to punish an individual for contempt arises from the same inherent authority to protect its own proceedings as does a court's contempt power. In *Chapman* and *Jurney*, this Court stated that an individual may be punished separately for contempt of Congress and for a substantive criminal offense based on the same conduct. The same analysis applies to an individual who is prosecuted for contempt of court and then for a substantive offense based on the same conduct.

With respect to lower court authority, respondents err in asserting that, before *Grady* v. *Corbin*, 495 U.S. 508 (1990), there was substantial lower court authority holding that the Double Jeopardy Clause bars successive prosecutions for contempt and for criminal conduct based on the same conduct. In support of that assertion, respondents cite two district

[1] Contrary to respondents' argument, *Menna* and *Colombo* do not differ from this case simply because "the criminal code offense in [*Menna* and *Colombo*] was entitled 'contempt.'" Resp. Br. 21 n.8. It was not the title of the criminal code offense in *Menna* and *Colombo*, but rather its statutory definition, that lent support to the defendants' arguments that they were prosecuted twice for the same offense.

[2] Respondents concede (Resp. Br. 13) that their double jeopardy analysis does not apply to summary contempt proceedings, but they fail to provide any principled basis for concluding that conduct that is subject to summary contempt proceedings is not the "same offense" as a substantive crime based on the same acts, while conduct that is subject to non-summary contempt proceedings constitutes the "same offense" as the related substantive crime for double jeopardy purposes.

court decisions and five state court decisions (Resp. Br. 22-23 & n.9). Of the five state court decisions, respondents acknowledge that two were based on the state law of Oregon, not federal law: *State* v. *McIntyre*, 764 P.2d 972 (Or. Ct. App. 1988), and *State* v. *Thompson*, 659 P.2d 383, 386 (Or. 1983). The remaining three cases were decided by intermediate state appellate courts. See *State* v. *Hope*, 449 So. 2d 633 (La. Ct. App. 1989); *People* v. *Lombardo*, 123 Cal. Rptr. 755, 758 (Cal. Ct. App. 1975); *People* v. *Rodriguez*, 514 N.E.2d 1033 (Ill. App. Ct. 1987), appeal denied, 520 N.E.2d 391 (Ill. 1988).[3] Respondents do not, and cannot, cite a single pre-*Grady* decision of the highest court of a State or a federal court of appeals holding that under the federal Constitution criminal contempt and a substantive offense based on the same conduct are the same offense.

3. Respondents argue that the effect of subjecting them to prosecution on substantive charges after they have been held in contempt is the same as prosecuting them twice for the same offense (Resp. Br. 39-40) and that the effect on the government of requiring it to prosecute them for all offenses at the same time would be minimal (Resp. Br. 15-18).

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[3] In *Rodriguez*, an intermediate appellate court in Illinois held that a defendant could be tried separately for contempt, based on violation of a court order, and for two substantive crimes based on the same conduct, 514 N.E.2d at 1037; the court also held, in full accord with our analysis here, that the defendant could not be tried separately for the same contempt and for another offense that included violation of the court order as an element, *ibid.* The Illinois Supreme Court has made clear that separate prosecutions for contempt and substantive offenses are permissible. *People* v. *Totten*, 514 N.E.2d 959 (Ill. 1987).

The fact that a second prosecution may be burdensome for a defendant is not sufficient, standing alone, to invoke the double jeopardy bar. In any case in which the government introduces evidence of already prosecuted crimes against a defendant under Federal Rule of Evidence 404(b), for example, the defendant may well have to defend himself against similar factual allegations before two juries. Yet, that is not sufficient to bar the second trial. See *Dowling* v. *United States*, 493 U.S. 342 (1990). Similarly, a defendant may be forced to defend against precisely the same charges a second time if his first trial has ended in a hung jury, see, *e.g.*, *Richardson* v. *United States*, 468 U.S. 317, 317-318 (1984); if he has successfully appealed a conviction on grounds other than insufficiency of the evidence, see, *e.g.*, *Tibbs* v. *Florida*, 457 U.S. 31 (1982); or if he has been prosecuted by both state and federal authorities, see, *e.g.*, *Abbate* v. *United States*, 359 U.S. 187, 190-194 (1959). In short, although the burden of multiple prosecutions was one of the reasons the Double Jeopardy Clause was included in the Bill of Rights, the Clause was made applicable only if the separate prosecutions were for "the same offense."

Nor are respondents correct in arguing (Resp. Br. 17) that the only difficulty faced by a prosecutor under the court of appeals' ruling is "essentially a conflict over timing" that could be "solved" either by Congress or by this Court. In the *Dixon* case, the defendant committed a serious felony while he was free on bond pending trial on another offense. The court needed a means to punish Dixon immediately and effectively for violating the terms of his release and to ensure that he would not commit further violations. On respondents' own account (Resp. Br. 3),

the only way to ensure that result was to hold him in criminal contempt. To postpone contempt proceedings and then consolidate the contempt charge with the drug distribution charge would have been futile, since the purpose of the contempt proceeding was to obtain immediate enforcement of the court's order releasing Dixon on bond. That goal could not have been attained had the court waited for an indictment and a criminal trial on the drug distribution charge.[4]

Similarly, amici in the *Foster* case have explained in some detail why a court must have authority to enforce civil protective orders quickly and effectively in order to protect the defendant's spouse from further violence.[5] See Ayuda, etc., Amici Br. 9-14. Respondents argue (Resp. Br. 27-29) that various schemes could be put into effect that would, in respondents' view, provide protection for victims of spousal abuse through the criminal justice system. But the efficacy of such schemes is open to doubt; indeed, as amici point out, the District of Columbia's plan for protecting victims of spousal abuse through civil protective orders was put into place precisely because the criminal justice system provided an inadequate remedy for such victims. Many States have come to the same conclusion. Ayuda, etc., Amici Br. 13.

[4] Although we agree with respondents that criminal contempt defendants are entitled to most of the procedural protections accorded to other criminal defendants, not all requirements applicable to ordinary criminal cases apply to contempt proceedings. For example, the right to an indictment by a grand jury has never been applied to those cited for contempt. See *Green* v. *United States*, 356 U.S. 165, 187 (1958); *United States* v. *Nunn*, 622 F.2d 802 (5th Cir. 1980).

[5] Respondents argue that the United States Attorney's Office did not request a postponement of either Dixon's or Foster's contempt proceedings to enable all charges against each respondent to be brought in one proceeding (Resp. Br. 18), and that such a postponement could have accommodated the needs of the court and the prosecutor (Resp. Br. 16). Respondents neglect the obvious explanation for the refusal to ask for a postponement: it was essential to enforce the order of release in Dixon's case and the civil protective order in Foster's case immediately, before Dixon could commit more offenses while on pretrial release and before Foster could seriously injure—or perhaps kill—his wife.

On a related point, respondents dispute our argument that, if prosecution of a defendant for criminal contempt barred a subsequent prosecution on substantive criminal charges, courts would in effect control the Executive Branch's exercise of its prosecutorial discretion, in violation of constitutional separation of powers concerns. Resp. Br. 15-18. Respondents assert that the referral process outlined by this Court in *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), by which "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions" before undertaking to appoint a prosecutor itself, 481 U.S. at 801, ensures protection of the Executive Branch's prosecutorial discretion.

Far from supporting respondents' argument, *Young* makes clear that the danger to which we referred would be unavoidable if a court's decision to prosecute a defendant for criminal contempt barred a later prosecution for a substantive criminal offense. This Court made clear in *Young* that, although a federal court should initially request that a federal prosecutor pursue criminal contempt charges, the court is not bound by the prosecutor's decision whether to proceed. This Court stated in *Young* that

a court "should appoint a private prosecutor only if that request is denied." 481 U.S. at 801. That is because "[i]f the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself." *Ibid.* The ultimate teaching of *Young* is that a court retains "its inherent power of self-protection," *ibid.*, and its ultimate control over the decision whether (and when) to prosecute.[6] As we explained in our opening brief (at 20-21), if that control has the effect of precluding the Executive Branch from exercising its prosecutorial discretion, it trenches upon core separation of powers concerns.[7]

In any event, this Court in *Young* was exercising its supervisory powers over the federal courts, and its holding consequently did not bind the state courts. See 481 U.S. at 802.[8] If the judgment below is affirmed, a finding of contempt would bar a prosecution for a substantive criminal offense in state courts as well. Since state courts need not employ the referral procedure outlined in *Young*, that referral procedure would do nothing to remedy the problem caused if, under the Double Jeopardy Clause, a state court's institution of contempt proceedings controls the prosecutor's authority to pursue substantive criminal charges.[9]

4. Respondents argue (Resp. Br. 30-38, 41-44) that the court of appeals' result follows directly from *Grady* v. *Corbin*, *supra*.

As we explained in our opening brief (at 24-32), the *result* in *Grady* marked a modest extension of this Court's precedents in the area, but the *formulation* of the double jeopardy test employed by the Court in *Grady* went substantially beyond any decision that came before it. Respondents' assertion that the court of appeals' result follows from pre-*Grady* authority and from the result in *Grady* is mistaken.

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[6] See also 481 U.S. at 800-801 ("[C]ourts have long had, and must continue to have, the authority to appoint private attorneys to initiate [contempt] proceedings when the need arises.")

[7] The conflict between the court's interest in promptly vindicating its authority and the prosecutor's interest in investigating and prosecuting criminal charges may affect not only the question whether to proceed, but also questions such as whom to charge, what charges to bring, and when to bring them. Even if the prosecutor believes he will ultimately want to prosecute a defendant for conduct related to that at issue in a contempt proceeding, the prosecutor may not know the full scope of the defendant's conduct or the identities of other individuals involved at the time the court wishes to proceed on the contempt citation.

[8] No party in the *Foster* case raised any issue concerning the applicability of *Young* to the District of Columbia courts. As respondents point out, at least one court has held *Young* inapplicable to local court proceedings in the District of Columbia. Resp. Br. 27 n.15. Numerous States permit private prosecutions of contempt. See Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 Wash. U. L.Q. 85, 103-107 (1992).

[9] Respondents argue (Resp. Br. 14 n.1) that in this case there is no difference between "the duties to which respondents were subjected by the court" and the duty to obey the law, which "preexisted their participation in judicial proceedings." That is not so. The court orders in both cases included directives that were not duties to which respondents were subjected by force of the general criminal law. See J.A. 8 (requiring Dixon to participate in a lineup); Pet. App. 4a (requiring Foster to stay away from his mother-in-law's home and place of work).

a. This Court has routinely applied the *Blockburger* "elements" test, rather than the *Grady* formulation or any variation of it, in successive prosecution cases. See Pet. Br. 36-41. Respondents' efforts to distinguish this Court's cases on the subject are unconvincing.

With respect to *In re Nielsen*, 131 U.S. 176 (1889), respondents assert that our view that *Nielsen* applied the "elements" test "runs counter to the explicit recognition in *Nielsen* that, under the statutory definition of the offenses, adultery and cohabitation [the two offenses at issue in *Nielsen*] were not the same." Resp. Br. 42. Respondents do not cite any portion of the *Nielsen* opinion for that "explicit recognition," and we are aware of none. *Nielsen* repeatedly cited and quoted *Morey* v. *Commonwealth*, 108 Mass. 433, (1871), each time with approval. See 131 U.S. at 187, 188, 190. As we noted in our opening brief (at 38-39), the *Morey* formulation quoted by this Court in *Nielsen* is identical to the formulation later adopted in *Blockburger*. The Court expressly distinguished *Nielsen* on its facts, and not as a matter of law, from *Morey*, see 131 U.S. at 188. And the Court construed the statute against cohabitation to include the elements of adultery, see 131 U.S. at 189, an interpretive effort that would have been unnecessary had the Court intended to adopt or apply anything other than the elements test. Respondents' contention that this Court in *Nielsen* departed from the *Blockburger* test runs squarely into the Court's own explanation of its holding, in which the Court embraced the traditional elements test as the proper device to determine whether two offenses are the same for double jeopardy purposes.

Nor are respondents correct in claiming that the other early cases we cite did not involve a "literal application of the *Blockburger* test." Resp. Br. 42. Respondents concede that *United States* v. *Bayer*, 331 U.S. 532 (1947), was decided "on the basis of the longstanding rule * * * that conspiracy and a substantive offense are separate offenses." Resp. Br. 43 n.23. But that rule followed directly from the proposition that a conspiracy and its underlying substantive offense each requires proof of an element that the other does not. See 331 U.S. at 542. Respondents concede (Resp. Br. 43 n.23) that in *Gavieres* v. *United States*, 220 U.S. 338 (1911), the Court found that the two crimes for which the defendant was prosecuted were not the same because each required proof of a fact that the other did not. That result required a literal application of the *Blockburger* rule. Although respondents sepeculate that *Gavieres* would have come out the same way under *Grady* (Resp. Br. 43 n.23), they provide no basis for that speculation, nor do they claim that the *Gavieres* Court believed it was applying anything other than the traditional elements test. Indeed, in the closing sentence of the opinion the Court expressly embraced the elements test and rejected any reliance on the identity of the conduct that was the subject of the two charges: "While it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other." 220 U.S. at 345.[10]

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[10] Respondents are correct (Resp. Br. 43 n.23) that the Court did not specifically recite the elements test in either *Grafton* v. *United States*, 206 U.S. 333, 349-351 (1907), or *Burton* v. *United States*, 202 U.S. 344, 380-381 (1906). None-

b. None of this Court's recent decisions involving successive prosecutions requires affirmance of the court of appeals' judgment in this case. *Harris* v. *Oklahoma*, 433 U.S. 682 (1977), on which respondents place substantial reliance, provides no support for their argument. *Harris* established that, where the statutory definition of one offense (felony murder) incorporates by generic reference a number of other offenses, the other offenses are properly viewed as lesser included offenses even if the elements of those offenses are not specifically set out in the statute. That principle is of no use to respondents. Notwithstanding respondents' claim to the contrary (Resp. Br. 35 n.19), criminal contempt is not a "ge-

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theless, the Court's discussion in each case makes it clear that the Court regarded the elements of the two offenses—not the particular facts of the crimes—as governing the question whether two charged offenses are the same. In *Grafton*, after analyzing the statutes under which the defendant was tried, 206 U.S. at 342-343, 348-351, the Court concluded that the offenses at issue—homicide and manslaughter—were the same because the two offenses were merely different "degree[s]" of the "identical offense." 206 U.S. at 350. And in *Burton*, the Court quoted a formulation that was an immediate precursor of the *Blockburger* rule (and is contrary to the formulation the Court used in *Grady*): two offenses are not the same "if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" 202 U.S. at 380 (emphasis in original). In *Gavieres*, which was decided only five years later, the Court quoted that language from *Burton* (as well as the pertinent language from *Grafton*) in support of its application of the elements test. *Gavieres*, 220 U.S. at 343-345. See also *Carter* v. *McClaughry*, 183 U.S. 365, 394-395 (1902) (setting forth the elements test as proper means of determining whether two charges are for the "same offense" within the meaning of the Double Jeopardy Clause).

neric reference" offense, as was the felony murder statute at issue in *Harris*. The definition of contempt of court does not refer to any other offense, either expressly or by implication.

The same point can be made in another way. A defendant cannot commit felony murder without committing some other felony; felony murder accordingly can be viewed as an aggravated form of the underlying felony. By contrast, contempt of court is often committed without violating any other criminal statute, as respondents acknowledge. See Resp. Br. 35 ("a contempt theoretically could be proved without establishing commission of a criminal code offense, and proof of a criminal code offense does not necessarily establish an element of all contempts"). Since contempt of court and substantive criminal offenses address different interests and share no common elements, contempt of court cannot be viewed as an aggravated form of any other criminal offense.

Nor do *Illinois* v. *Vitale*, 447 U.S. 410 (1980), or *Grady* v. *Corbin*, *supra*, require affirmance in this case. *Vitale* involved the question whether a defendant could be tried for involuntary manslaughter after being tried for failing to reduce speed to avoid the automobile collision out of which the manslaughter charge arose. This Court vacated the judgment of the Illinois Supreme Court that the successive prosecutions would violate the Double Jeopardy Clause and remanded for further proceedings. Although the Court commented that the defendant may have a "substantial claim of double jeopardy," 447 U.S. at 421, depending on how the State prosecuted the case, the Court did not resolve that question.

Even the Court's discussion of the unresolved question in *Vitale*—and its subsequent holding in

Grady when that question reached the Court—do not establish the broad principle required for affirmance in this case. It is true, as respondents argue, that failing to reduce speed to avoid an accident (or, as in *Grady*, driving while intoxicated) is not technically a lesser included offense of involuntary manslaughter. A defendant found guilty of involuntary manslaughter has not necessarily driven while intoxicated or failed to reduce speed to avoid an accident. Yet, as the Court viewed *Vitale* and *Grady*, a defendant who is guilty of the lesser offenses of failing to reduce speed to avoid an accident or driving while intoxicated is reasonably viewed as having had the mental state necessary to commit the greater offense of involuntary manslaughter.[11] And the fact that a defendant charged with the lesser offense has the mental state necessary to satisfy the greater offense is reasonably clear without knowing the facts of any particular case. Accordingly, the Court concluded that *Grady*, like *Harris*, involved a situation in which two offenses, though not technically related as greater and lesser included offenses, bore a sufficiently close analogy to that relationship to trigger the double jeopardy bar.

The same cannot be said about this case. A defendant who is held in contempt of court has not necessarily satisfied any element of any other criminal offense, including the drug distribution, threat, and assault offenses at issue here. Nor can it be said that a defendant guilty of those offenses has satisfied any necessary element of criminal contempt. In short, as

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[11] See, *e.g.*, W. LaFave & A. Scott, *Handbook on Criminal Law* 586, 593 (1972) (defining involuntary manslaughter); Model Penal Code § 210.4 (1985) (negligent homicide).

we explained in our opening brief (at 30-32), the offenses for which each respondent was prosecuted are entirely distinct, and the analogy to greater and lesser included offenses on which the Court relied in *Harris*, *Vitale*, and *Grady* is inapt.

5. We believe that the formulation the Court employed in *Grady* to determine when successive prosecutions are barred by the Double Jeopardy Clause is broader than was necessary to decide that case, and that the result in *Grady* does not require affirmance of the judgment below. If the Court concludes that *Grady* requires affirmance here, however, we believe that *Grady* should be reconsidered and overruled, for the reasons given in our opening brief (at 33-46).

Respondents' arguments to the contrary are essentially that *Grady* is consistent with some of the Court's precedents, Resp. Br. 40-45, and that the *Grady* test "is neither complex nor difficult to apply," Resp. Br. 46. We have responded above to respondents' arguments concerning *Grady's* relationship to this Court's traditional double jeopardy jurisprudence, and we submit that a broad reading of *Grady* finds little support in past cases. With respect to the difficulty of applying the *Grady* test, we pointed out in our opening brief (at 41) that this Court in *Felix*, as well as the lower courts, have recognized the difficulties of applying the *Grady* formulation. More importantly, however, a broad reading of *Grady* is inconsistent with the language of the Double Jeopardy Clause and the history of its interpretation. As in *Felix* and in this case, a broad application of *Grady* threatens to bar criminal prosecutions that have long been accepted as legitimate and impair the effective enforcement of the criminal laws. If this Court de-

termines that *Grady* has that effect, *Grady* should be reconsidered.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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